Supreme Court, U.S.
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No. 10-348

In The

Supreme Court of the United States

JIANLIN ZHANG,

Petitioner,

v.

ERIC HOLDER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE PETITIONER IN REPLY

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The Respondent incorrectly raises voluntary departure penalties as a point not raised or addressed in the petition for a writ.

The Supreme Court Rule 15.6 allows a reply brief from the Petitioner when the Respondent's brief in opposition raises a new point not previously raised in the petition for a writ. The Respondent has raised such a point in his brief in opposition to the petition. The Petitioner thus submits this reply brief to address this new point raised by the Respondent.

The new point the Respondent raises is: the penalties rising from a failure to depart under a grant of post hearing voluntary departure, 8 USC 1229c(b)(3) and 8 USC 1229c(d)(1). This new point is however not applicable, as the petitioner is not subject to any penalties for failure to depart under a grant of post hearing voluntary departure.

In order to be subject to grant of post hearing voluntary departure the Immigration Court must state that the voluntary departure is contingent upon the payment of a $500.00 voluntary departure bond. Thus the foreign national must accept the voluntary departure by paying the voluntary departure bond within 5 days of the Immigration Court's order, 8 USC 1229c(b)(3), *In re Jose Dario Diaz-Ruacho*, 24 I&N Dec. 47 (BIA 2006). If this bond is not paid the contingency is not complied with and there is no voluntary departure, or penalties for failure to depart, *In re Jose Dario Diaz-Ruacho*, 24 I&N Dec. 47 (BIA 2006).

I have confirmed with the Petitioner that the required $500.00 voluntary departure bond payment was never paid. The Petitioner, believing in the legal correctness of his case, chose to forego voluntary departure and sought appellate relief instead. Thus, the voluntary departure bond was not paid by the Petitioner and the voluntary departure offered by the Immigration Court never took effect. Further, the Immigration Court never advised the petitioner of the contingent nature of the voluntary departure bond nor the consequences for failure to post the required voluntary departure bond. Thus voluntary departure never took effect. As the voluntary departure never took effect there can be no penalty for failure to depart. The Board of Immigration Appeals clearly states that:

> We find that the posting of a voluntary departure bond is a condition precedent to permission to depart voluntarily at the conclusion of a removal proceeding. We therefore conclude that an alien who fails to meet the voluntary departure bond requirement is not subject to the penalties of section 240B(d)(1) of the Act.

In re Jose Dario Diaz-Ruacho, at 47, 51.

Dada v. Mukasey is not applicable as the Petitioner is not subject to the effect of an order of voluntary departure. *In re Jose Dario Diaz-Ruacho*, 24 I&N Dec. 47 (BIA 2006); *Dada v. Mukasey*, 554 US 1 (2008).

If this Honorable Court rules in favor of the Petitioner, the Immigration Court will hear the

Petitioner's application for permanent residence status. There is no ten year bar to adjustment as the Respondent erroneously alleges. Petitioner is eligible to adjust his status to lawful permanent status in the Immigration Court.

The Respondent erroneously raises the new point of a voluntary departure bar to adjustment. This does not apply to the Petitioner. As such, this should, with respect, be ignored as a non-relevant distraction. The only real issue that stands before this Honorable Court is that of the legislative language of 8 USC 1255(i) which states "notwithstanding section a and c". The Respondent erroneously asks the US Supreme Court to uphold the Tenth Circuit decision that this language means – "including section a but excluding section c". The Petitioner correctly asks this Honorable Court to find this language means – "excluding section a and excluding section c".

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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Counsel of Record

JANUARY 2011